2005

1-800 Contacts v. Randolph Weigner : Brief of Appellee

Utah Court of Appeals

Denver C. Snuffer, Daniel B. Garriott; Nelson, Snuffer, Dahle & Poulsen; attorneys for appellees.
Paxton R. Guymon, Joel T. Zenger; Miller, Guymon; attorneys for appellant.

IN THE UTAH COURT OF APPEALS

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1-800 CONTACTS, INC., a Delaware corporation, Plaintiff/Appellant, vs. RANDOLPH WEIGNER, an individual; RANDOLPH WEIGNER DTVTV@YAHOO.COM; and LENSFAST, LLC, a Wyoming limited liability company; Defendants/Appellees.	No. 20050036 Civil No. 040911552 PRIORITY NO.: 15

APPELLEE'S BRIEF ON APPEAL

Appeal from the Ruling and Order of the Third District Court,
Salt Lake County, Salt Lake Division, The Honorable Bruce C. Lubeck

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APPELLEE'S BRIEF

Appellees, Randolph Weigner, Randolph Weigner DTVTV@YAHOO.COM, and Lensfast, LLC submit this brief in opposition to the appeal before this Court.

LIST OF ALL PARTIES TO THE PROCEEDING BELOW

The Plaintiff/Appellant:

1-800 Contacts, Inc.,

The Defendants/Appellees:

Randolph Weigner, Randolph Weigner DTVTV@YAHOO.COM, and Lensfast, LLC

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JURISDICTION OF APPELLATE COURT

The jurisdiction of all appellate courts "shall be provided by statute."[1] Section 78-2-2(3)(j) of the Utah Code, provides that: "The Supreme Court has appellate jurisdiction ..., over orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction[.]"[2] This is an appeal from the final judgment of the Third District Court in a civil matter, and although it has original appellate jurisdiction, the Supreme Court has transferred this matter to the Court of Appeals pursuant to § 78-2-2(4) and § 78-2a-3(2)(j), which statutes provide that the Supreme Court may transfer any matter over which it has original appellate jurisdiction.

ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred when it granted summary judgment after a finding of no genuine issues of material fact.

2. Whether the trial court correctly found that if there actually was an agreement between these parties that each of the terms of the agreement should be given equal weight, and in particular, where one party reserved himself the right to rescind or modify the agreement up and until a written agreement was drafted and fully executed, and each of the parties assented to that term through their further communications and actions, if that term should be maintained as a part of the agreement.

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[1] Utah Const., Article VIII, § 5.

[2] Ut. Code Ann., § 78-2-2(3)(j) (1953, as amended).

STANDARD OF REVIEW

Summary judgment is proper when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c). On appeal from a grant of summary judgment, this court should apply the same standard as that applied by the trial court. *Briggs v. Holcomb*, 740 P.2d 281, 283 (Utah Ct.App. 1987). Accordingly, this court should review the trial court's decision for correctness. *See, e.g., Blue Cross & Blue Shield of Utah v. State*, 779 P.2d 634, 636 (Utah 1989).

Whether a contract exists between parties is a question of law; therefore, this Court should review the trial court's conclusion of law under a correction of error standard. *Bailey v. Call,* 767 P.2d 138, 139 (Utah App. 1989), *cert. denied,* 773 P.2d 45 (Utah 1989); *accord Scharf v. BMG Corp.*, 700 P.2d 1068, 1070 (Utah 1985).

APPLICABLE RULES AND REGULATIONS TO APPEAL

There are none.

STATEMENT OF THE CASE

Nature of the Case:

The parties in this case were involved in negotiations regarding the purchase and sale by 1-800 Contacts, Inc. of Lensfast, LLC. The principle agent for 1-800 Contacts was Jonathan Coon. The principle agent for Lensfast was Randolph Weigner, who is also a named Defendant in this case. Toward that end, emails were sent back and forth between

the parties, which contained terms for the agreement. A part of those terms, which the lower Court relied upon in making it's decision, reserved the right for Lensfast, LLC to rescind or modify the agreement up and until a written agreement was drafted and executed by the parties. See Ct. Rec. 12, 105. Although a written agreement was eventually drafted, it was not accepted by Lensfast, LLC and therefore was never executed. 1-800 Contacts, Inc. brought this action alleging two causes of action, one for declaratory judgment requesting the Court determine the existence of the agreement, and a second for specific performance requesting the Court to enforce the terms of the agreement as 1-800 Contacts saw them.

Course of Proceedings and Disposition Below:

On August 25, 2004, Lensfast filed it's Motion for Summary Judgment along with an accompanying memorandum. See Ct. Rec. 29-54. 1-800 Contacts filed an Opposition on September 17, 2004. See Ct. Rec. 55-76. Lensfast filed it's reply on September 27, 2004. See Ct. Rec. 77-93. Each party submitted the matter for decision on or about October 13, 2004 or October 14, 2004. See Ct. Rec. 94-99. Oral argument was held December 13, 2004. On that same date, the Court entered it's Ruling and Order granting Lensfast's Motion for Summary Judgment. See Ct. Rec. 104-110. A copy of the Ruling and Order is attached in the Appendix as Addendum 1 to this brief.

Facts Established in the Record Below:

1. In late March or early April of this year, the parties had a telephone conversation in which Plaintiff indicated an interest in purchasing the assets of Defendant's company. See Ct. Rec. 105.

2. Following the telephone conversation, a series of email messages were sent between the parties beginning on the morning of April 13, 2004, which stated:

> "Jonathan,
>
> **This is an offer in principal** to sell you the assets of Lensfast LLC including the domain name contactlens.com for $800,000.00.
>
> **This offer is entirely dependent on my agreement with your attorney's terms and conditions for the acquisition and is not to be considered legally binding until a physically executed contract between our two companies is completed.**
>
> **Until the time said contract is executed I may, at my sole discretion, rescind or modify this offer in any way I see fit.**
>
> The contract must include a provision to have the entire $800,000.00 placed in escrow with my attorney, Peter Tannenwald of Irving, Campbell & Tannenwald in Washington, DC prior to transferring any assets of Lensfast LLC to 800 Contacts.
>
> Thank you for your offer and please have your attorney contact me at your earliest convenience.
>
> Sincerely,
>
> Randolph Weigner
> Lensfast LLC
> (800) Lensfast (536-7327)"

(Emphasis added) See Addendum A of Appellant's brief. See also Ct. Rec. 12.

3. Coon sent to Weigner an email in response to Weigner's April 13, 2004 email as follows:

> "Randy:

> Sorry for the delay. Your email got screened by our junk mail program. I have added this email address to Outlook and my whitelist, so it should come through next time.
>
> **We accept your offer** to sell and agree to purchase the assets of LensFast LLC including: contactlens.com, lensfast.com, the name LensFast, the customer database for any lensfast related companies, and any related internet domains or phone numbers associated with LensFast LLC.
>
> Standard with any transasaction of this magnitude (and as we did with contactlenses.com), we will also expect a one year non-compete. Consideration will be included as part of the $800k purchase price. We will accept Campbell & Tannenwald as the escrow agent. Email back acceptance (just an email that says "we are in agreement on this email") and we will get to work on a short definitive agreement.
>
> This email from the 13th was clearly written by counsel. I sent it to our counsel and they wrote a lengthy response which they asked me to send back. I tossed a bunch of the CYA stuff and boiled it down to this email. Let's both try to keep this simple. **I have asked our counsel to keep the document short and in plain English.** I can't guarantee that someone getting paid by the hour won't try to make things more complicated, but let's both direct our counsel not to run up the bill on this.
>
> We either have an agreement or we don't. If we do, lets get it done. If we don't, let's not waste each other's time and resources playing tennis with a document.
>
> Thanks,
>
> -Jonathan

(Emphasis added) See Addendum A of Appellant's brief. See also Ct. Rec. 11.

4. Pursuant to that email, Appellant expressed acceptance of Lensfast's offer, but indicated that he also wanted a one-year non-compete agreement. Id.

5. That email also invites acceptance of the new non-compete term by return e-mail stating simply "we are in agreement on this email" and then indicated that after acceptance, "we will get to work on a short definitive agreement." See Ct. Rec. 10, 107.

6. On April 15, 2004, Weigner responded agreeing to the previous terms except for the non-compete agreement, which he advised required some modification because of a previous contractual obligation. See Addendum A of Appellant's brief. See also Ct. Rec. 10, 107.

7. On April 16, 2004, in reference to the drafting of a written agreement, Coon informed Weigner that "[they] should have something to you next week." See Addendum A of Appellant's brief. See also Ct. Rec. 9, 10, 107, 108.

8. On April 16, 2004, Weigner requested that Coon have "his legal people draw up the contract." Id.

9. Coon responded by sending an email to their counsel, asking that he "prepare a brief plain English agreement using the agreed upon terms below." Id.

10. Coon then copied the same email sent to his counsel, to Weigner and stated that "we should have something to you next week." Id.

11. There has never been a signed agreement between the parties. See Ct. Rec. 29-36, 91-93.

12. Weigner did not agree to all the terms of the written agreement. Id.

13. Weigner at all times understood that all of the both oral and email conversations between the parties were negotiations preliminary to the entry of an actual

agreement, which would be written, reviewed, and signed before it was finalized. Id. See also, Ct. Rec. 43, 61 ¶ 16.

SUMMARY OF ARGUMENTS

1-800 Contacts argues that lower court erred when it concluded that 1-800 Contacts was not entitled to specific performance of the alleged agreement between these parties. That conclusion was based upon a "Catch 22" within which 1-800 Contacts finds themselves. The lower court specifically found that at all times the parties had agreed and contemplated that the agreement was conditioned upon the drafting and execution of a final written contract. See Ct. Rec. 109. 1-800 Contacts takes issue with this finding, alleging that the agreement already existed to a sufficient degree within the emails the parties exchanged regarding the sale and purchase. Even if that were true, however, the lower court correctly found that if there is an agreement based upon the terms included within the emails, that Lensfast specifically reserved itself the right to rescind or modify the agreement up and until a written agreement was fully executed containing all the terms of the sale. Id. 1-800 Contacts wishes to ignore that provision of the agreement even though each of the emails between the parties and including one email to 1-800 Contact's counsel, that followed the April 13th email, indicated their assent and a requirement that such an agreement be drafted and finally executed. See Ct. Rec. 7-12, see also Addendum to Appellant's brief. In fact, 1-800 Contacts actually did draft such an agreement further demonstrating by their actions their acceptance of that term. If all the terms for the agreement were already contained in the emails, why would they draft an additional

agreement for signature? Because it was recognized as a requirement, something 1-800 Contacts admitted to as an undisputed fact. See Ct. Rec. 61.

If there was no agreement, specific performance is impossible. If there was an agreement, Lensfast reserved the right to rescind or modify the agreement, which it did, and upon which the lower court correctly based it's decision to dismiss the complaint by summary judgment.

ARGUMENT

I. If There Was an Agreement, It Includes ALL Terms.

Plaintiff essentially argues that it should be allowed to pick and choose what it believes to be the relevant parts of the "agreement" between these parties. Defendant has always asserted that there does not exist any agreement between these parties. To the extent there was an agreement, it was contingent upon the final acceptance and execution of a written agreement. Plaintiff alleges the existence of a binding and enforceable agreement, and bases that allegation upon emails sent between these parties. Those emails, which Plaintiff relies upon for its allegation of a binding agreement, clearly include terms which Plaintiff wishes to ignore. Those terms were clear and undisputed at the trial level allowing the trial court to appropriately find summary judgment. Defendants' summary judgment should be affirmed.

Appellant argues that the trial court exceeded his bounds by determining the intent of the parties with regard to the terms of the agreement. At the same time, they have asserted a cause of action requesting that the Court declare there to be a valid and enforceable

contract based upon a collection of emails between these parties. Those arguments don't jive, they are mutually exclusive. How can the Court determine the existence of an agreement without an examination of the terms contained within what Appellant has presented to be the four corners of the document. "The meaning and effect that a contract is to be given depends primarily on the intent of the parties; and such intent is to be ascertained first by looking within the four corners of the agreement itself." *Foote v. Taylor*, 635 P.2d 46, 48 (Utah 1981). Which is exactly what the Court did.

On April 13th, Mr. Weigner emailed Mr. Coon stating: "This is an offer in principal [sic][.]" See Ct. Rec. 12. He then goes on to include some of the terms of the offer, one of which reserves Mr. Weigner the right to rescind or modify the agreement up and until the time the agreement is put in writing by Mr. Coon's attorney and fully executed. Id. Clearly at this point there is no agreement.

On April 15th, Mr. Coon replies, "We accept your offer to sell and agree to purchase the assets of Lensfast LLC [.]" See Ct. Rec. 11. If there is actually an agreement between these parties, Mr. Weigner's offer was clearly accepted at that time by Mr. Coon. That acceptance must include the right to rescind, because that was a part of the offer being accepted. Accepting it cannot simply read out of the terms the right to rescind. So there is still no final agreement because if this "acceptance" intended to alter the right to rescind, then there is no meeting of the minds. If, however, it does not alter the right to rescind, then the right remained and the agreement was rescinded. Either way there is no right to make the claim Plaintiff made below.

Mr. Coon's "acceptance" includes an additional new term requiring a one-year noncompete agreement, and states nothing about Mr. Weigner's reservation of right to rescind or modify, except to assent to it by indicated that he would have his attorney keep the document short and in plain English. See. Ct. Rec. 11. He invites acceptance to the new term regarding the non-compete agreement by requesting there be certain language added, which Mr. Weigner does in an email that same day. See Ct. Rec. 10. Each of them, the following day reiterate the requirement to put the agreement in writing. See Ct. Rec. 9. Mr. Coon, in fact cc's an email sent to his counsel requesting that he draft an agreement to Mr. Weigner. See Ct. Rec. 9.

Examining the four corners of the document, if there actually is an agreement between these parties, one of the terms, which is not disputed at any time, and which is continually assented to and reaffirmed is the requirement to have the agreement put in writing at Mr. Weigner's request. That request specifically reserved the right to rescind or modify the agreement in any way up until it became a fully executed written agreement, and that Mr. Weigner agreed with the terms drafted in that agreement. See Ct. Rec. 9-12. It is the Court's responsibility to determine the terms of the agreement as a matter of law. See *Bailey v. Call,* 767 P.2d 138, 139 (Utah App. 1989), *cert. denied,* 773 P.2d 45 (Utah 1989); *accord Scharf v. BMG Corp.*, 700 P.2d 1068, 1070 (Utah 1985). A trial court's finding about whether a party accepted an offer or a counteroffer is a finding of fact. *Kimball v. Campbell*, 699 P.2d 714, 716 (Utah 1985). That is exactly what the trial court did. It did not have to weigh the intentions of the parties as it found certain terms to be clear.

Appellant's arguments that the requirement to formalize the agreement in writing are contrary to their own admissions. In response to Defendants' Statement of Fact, paragraph 16 in their Memorandum in Support of Motion for Summary Judgment, Appellant specifically states that "Plaintiff does not dispute that Weigner understood that there would be a final written agreement." See Ct. Rec. 61. They further state that "[t]he oral communications and e-mails exchanged between April 13 and April 16 make it abundantly clear that the parties had reached an agreement on the material terms of the purchase agreement[.]" See Ct. Rec. 61-62. Appellants further state that "Mr. Coon's April 15 e-mail to Weigner constituted both an acceptance of Weigner's offer to sell the assets of Lensfast set forth in Weigner's April 13 email, including the domain name contactlens.com, and an offer by Mr. Coon relating to the need for a one-year covenant not to compete." See Ct. Rec. 57. The trial court could not find it any other way. Plaintiff did not dispute the existence of that term to the trial court, it was therefore found to be appropriately included if there actually was an agreement between these parties.

The trial court in it's ruling made this point with clarity.

> "While the Plaintiff would construe the statement made by Defendant in the April 13 e-mail that no agreement between the parties would be considered binding until a physically executed contract between the parties is completed as meaning merely that there was an intention to memorialize the agreement reached through e-mail correspondence, the clear language of those e-mails belies that assertion. It is upon the written documents alleged to have formed agreement itself that the Court must base its decision, and no upon one party's interpretation of that document. There is no ambiguity in Defendant's reservation of the right to rescind or modify his offer until a forma contract was executed by counsel. Nor is there any ambiguity in the e-mails - the very

> documentation which Plaintiff now contends establishes the terms of the agreement- that Plaintiff did not consent to Defendant's conditional offer."

See Ct. Rec. 109.

If there actually was an agreement between these parties, it included a specific reservation of rights to rescind or modify by Mr. Weigner. That was not disputed at the trial court and in fact was found to be true. There was no requirement to weigh evidence to make that determination, and there was no error in making that determination.

II. There Was No Error in Finding the Agreement Could Not be Enforced.

Under Utah law, the party claiming that there is a contract has the burden to prove that "there has been mutual assent by the parties manifesting their intention to be bound by its terms. Furthermore, a contract can be enforced by the courts only if the obligations of the parties are set forth with sufficient definiteness that it can be performed." *Bunnell v. Bills*, 368 P.2d 597, 600 (Utah 1962), *overruled in part on other grounds by Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293, 302-04 (Utah 1982). The trial court found in this case, that to the extent there was actually an agreement between the parties, Mr. Weigner had reserved for himself the right to rescind or modify the agreement until it was fully executed. Appellant, dissatisfied with that finding, now argues it was error for the trial court not to find the agreement could not be specifically enforced. Specific performance of the agreement, however, would be inappropriate given the fact that there was never a written and fully executed agreement, although such was contemplated and agreed to by the parties.

Even if that term did not exist, which it does, specific performance still would not be appropriate. It is often said that a greater degree of certainty is required in the terms of a contract which is to be specifically enforced in equity than is necessary in one which is to be the basis of an action at law for damages. *See Pitcher v. Lauritzen*, 423 P.2d 491, 18 Utah 2d 368 (1967). "Specific performance is a remedy of equity which is addressed to the sense of justice and good conscience of the [trial] court, and accordingly, considerable latitude of discretion is allowed in [the] determination as to whether it shall be granted and what judgment should be entered. . . ." *Morris v. Sykes*, 624 P.2d 681, 684 (Utah 1981). It is a widely applied hornbook concept that specific performance is not available as a remedy where there is not an enforceable contractual agreement. The section of Am. Jur.2d relating to this issue states that:

> "the existence of a valid contract is essential to the remedy of specific performance. In order for equity to decree specific performance, it is necessary that there be in existence and in effect a contract valid at law and binding upon the party against whom performance is sought, for specific performance is never applicable where there is no obligation to perform. If the existence of a valid contract is matter of doubt, equity will not decree specific performance. Tentative arrangements which were never consummated and never made final cannot form the subject matter of an action to compel specific performance. And a mere agreement to enter into a contract in the future is not specifically enforceable in equity."

71 *AmJur 2d* § 13.

The courts in Utah are in agreement with that general rule. "Specific performance cannot be required unless all terms of the agreement are clear. The court cannot compel the performance of a contract which the parties did not mutually agree upon." *Pitcher v.*

Lauritzen, 423 P.2d 491, 18 Utah 2d 368 (1967). A binding contract can exist only where there has been mutual assent by the parties manifesting their intention to be bound by its terms. Furthermore, a contract can be enforced by the courts only if the obligations of the parties are set forth with sufficient definiteness that it can be performed. See *Bunnell v. Bills,* 13 Utah 2d 83, 368 P.2d 597, 600 (1962). "Under the circumstances shown to exist here, where there was simply some nebulous notion in the air that a contract might be entered into in the future, the court cannot fabricate the kind of a contract the parties ought to have made and enforce it." *Valcarce v. Bitters,* 12 Utah 2d 61, 362 P.2d 427, 428-29 (1961). When the parties leave material matters so obscure and undefined that the court cannot say whether the minds of the parties met upon all the essentials or upon what substantial terms they agreed, the case is not one for specific performance. See *D.H. Overmyer Co. v. Brown,* 439 F.2d 926, 929 (10th Cir. 1971) (quoting with approval 49 Am.Jur. *Specific Performance* § 22). *Southland Corp. v. Potter*, 760 P.2d 320 (Utah App. 1988)

The contract must be free from doubt, vagueness, and ambiguity so as to leave nothing to conjecture or to be supplied by the court. See *Pitcher.* It must be sufficiently certain and definite in its terms to leave no reasonable doubt as to what the parties intended, and no reasonable doubt of the specific thing equity is called upon to have performed, and it must sufficiently certain as to its terms so that the court may enforce it as actually made by the parties. *Id.* Whenever it appears that material matters are not clear, certain, and complete, but are left by the parties so obscure or undefined that the court cannot say

whether or not the minds of the parties met upon all the essential particulars, or if they did, the court cannot say exactly upon what substantial terms they agreed, the case is not one for specific performance. See *D.H. Overmyer Co.* at 929.

To the extent that there was any agreement between the parties, it was an agreement in principal and simply a nebulous notion discussed by the parties. That agreement in principal cannot be enforced absent a final, clear, specific agreement with terms which the Court can enforce, rather than first write before enforcing. To enforce it at this point would require that this Court make up terms to fill in the gaps that were not filled in by the parties. The trial court determined that to be inappropriate and chose not to fill in those gaps. That is not the court's responsibility.

Defendants rely upon *Barker v. Francis*, 741 P.2d 548 (Utah Ct. App. 1987) for the general assertion that all the terms of an agreement need not be definite for specific performance, only the material ones. In that case, even though the parties had each signed an Earnest Money Agreement, (a written, signed agreement) which the court found to be valid and binding, the court refused to grant specific performance due to a finding of impossibility of performance. That was significantly more than the parties have in this case. There is no writing, other than the email communications, none of which are executed, and all of which require or contemplate the preparation and execution of written agreement. Furthermore, that case involved only the swap of some land. This case involves the purchase and sale of an entire business and all the appurtenances that go with it. Subject and price are not sufficient.

III. To the Extent that the Agreement Was Preliminary, Weigner Still is Under No Obligation to Perform.

Lastly Plaintiff presents an argument regarding a "Preliminary Agreement." That issue and that argument was never presented to the lower Court, neither in their oppositional memoranda, nor in the argument before the Court. It is therefore inappropriately brought to this Court and should be stricken. Even if it were appropriately before this Court, it is without merit, and still does not require Lensfast to sell 1-800 Contacts the business. Nor does it provide this Court the appropriate authority to reverse summary judgment.

"[I]f the preliminary writing was not intended to be binding on the parties at all, the writing is a mere proposal, and neither party has an obligation to negotiate further." *Adjustrite v. GAB Bus. Servs.*, Inc., 145 F.3d 543, 548 (2d Cir. 1998). A binding preliminary commitment is created "when the parties agree on certain major terms, but leave other terms open for further negotiation." *Id.* A preliminary commitment is basically an "agreement to agree," and requires that the parties negotiate and act in good faith in their attempts to reach a final agreement. *See id.*; *P.A. Bergner & Co. v. Martinez*, 823 F. Supp. 151, 156 (S.D.N.Y. 1993). While a party who enters into a binding preliminary commitment must act in good faith, the party "has no right to demand performance of the transaction." *Adjustrite*, 145 F.3d at 548.

"There does not appear to be any doubt that if the parties make it clear that they do not intend that there should be legal consequences unless and until a formal writing is executed, there is no contract until that time." *Engineering Assoc.*, 622 P.2d at 787. See *R.J.*

Daum Constr. Co. v. Child, 247 P.2d 817, 820 (Utah 1952) (explaining that "'if an intention is manifested in any way that legal obligations between the parties shall be deferred until the writing is made, the preliminary negotiations and agreements do not constitute a contract'") (quoting Restatement of Contracts § 26 cmt. a (1932)). Such is the case here.

On facts similar to those of the instant case, the court in *Doll v. Grand Union Co.*, 925 F.2d 1363, 1370 (11th Cir. 1991) concluded that it was "unwilling to allow a jury to infer an agreement to sign a lease when one of the parties specifically declared its intention not to be bound until a lease was drafted and signed by both parties." 925 F.2d at 1370. The court explained that while enforcing a verbal agreement may be justified where the evidence suggests that this was the intent of the parties, "when the parties make their intentions [not to be bound absent a formal executed agreement] clear, there is no basis for a court to step in and contradict their explicit desires." *Id.* See 1 Joseph M. Perillo, *Corbin on Contracts* § 2.9, at 149-50 (revised ed. 1993); see also *Engineering Assocs., Inc. v. Irving Place Assoc., Inc.*, 622 P.2d 784, 787 (Utah 1980) ("if the parties make it clear that they do not intend that there should be legal consequences unless and until a formal writing is executed, there is no contract until that time"); *accord Triax Pacific. Inc. v. American Ins. Co.*, Civ. No. 94-4091, 1995 WL 643156, at *5 (10th Cir. 1995).

The parties in this case made it clear that there would be a written and executed agreement before either party was bound. That never materialized. All Lensfast was required to do, under the law relied upon by Appellants, was to negotiate in good faith. That does not give Appellant the right to specific performance of an agreement which never made

it to finality. Or, if it did make it to finality, the right to rescind was included and that right was exercised. The trial court's decision to dismiss this case on summary judgment was correct and should be affirmed.

CONCLUSION

Pursuant to the foregoing arguments and the law, Appellees respectfully request this Court deny Appellant's request to reverse the trial court and that this Court affirm the trial court's granting of summary judgment.

DATED this 23rd day of May, 2005.

NELSON, SNUFFER, DAHLE & POULSEN

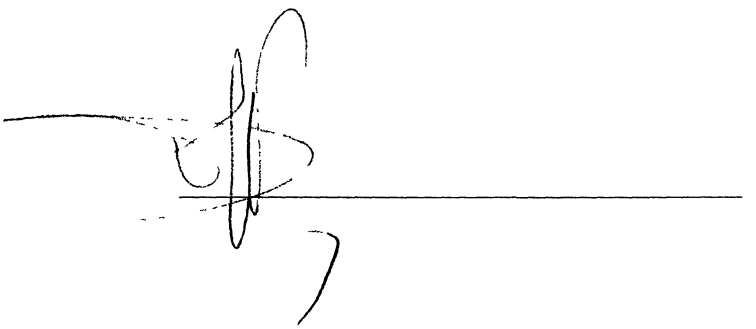
Denver C. Snuffer, Jr.
Daniel B. Garriott
Attorney for Appellees

CERTIFICATE OF SERVICE

I hereby certify that I served two true and correct copies of the foregoing APPELLEE'S BRIEF **ON APPEAL**, via first class mail, postage prepaid, on the following:

Paxton R. Guymon
Joel T. Zenger
MILLER GUYMON, P.C.
165 South Regent Street
Salt Lake City, UT 84111

on this 23 day of May, 2005.



APPENDIX

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

1-800 CONTACTS	:	RULING and ORDER
Plaintiff,	:	CASE NO. 040911552
vs.	:	HONORABLE BRUCE C. LUBECK
RANDOLPH WEIGNER, et al.	:	DATE: December 13, 2004
Defendants.	:	

This matter came before the Court December 13, 2004, for oral argument on Defendant's Motion for Summary Judgment. Defendant was present through Denver C. Snuffer and Daniel B. Garriott and plaintiff was present through Paxton R. Guymon and Joel T. Zenger. Defendant filed his motion on August 25, 2004, to which Plaintiff's opposition was received on September 17, 2004. Plaintiff's Reply was filed on September 27. Plaintiff submitted his motion for decision on October 13, 2004, and Defendant independently submitted the matter for decision, with request for oral argument on October 14. Oral argument was heard on this matter on December 13, 2004. Having considered the case file, the Motion and the Memoranda submitted by the parties, and the arguments made in open court, the Court enters the following decision:

BACKGROUND

Defendants ask this Court to summarily dismiss this action for specific performance because they believe that the undisputed material facts demonstrate that the parties never entered into an enforceable contract.

Material to the present issue, the following facts are undisputed.

In late March or early April of this year, the parties had a telephone conversation in which Plaintiff indicated an interest in purchasing the assets of Defendant's company. Following the telephone conversation, a series of email messages were sent between the parties beginning on the morning of April 13, 2004. The initial email, which identifies itself as an "offer in principal [sic] to sell . . . the assets of LensFast LLC", sets forth certain desired conditions, including that the

> offer is entirely dependent upon [Defendant's] agreement with [Plaintiff's] attorney's terms and conditions for the acquisition and is not to be considered legally binding until a physically executed contract between [the] two companies is completed.
> Until the time said contract is executed I may, at my sole discretion, rescind or modify this offer in any way I see fit.

E-mail messages, attached as Exhibit A to Complaint, Weigner Affidavit and Coon Affidavit. The e-mail concludes with specific designation of the acceptable manner of payment.

Plaintiff's e-mail response to the letter was sent some time before 12:25 p.m. on April 15, and expressed acceptance of Defendant's "offer," but indicated that Plaintiff wanted a one-year non-compete agreement. The e-mail invited acceptance of the new term by return e-mail stating simply "we are in agreement on this e-mail" and then indicated that after acceptance, "we will get to work on a short definitive agreement." It concluded by stating:

> I have asked our counsel to keep the document short and in plain English. I can't guarantee that someone getting paid by the hour won't try to make things more complicated, but let's both direct our counsel not to run up the bill on this. We either agree or we don't. If we do, let's get it done. If we don't let's not waste each other's time and resources playing tennis with a document.

Id.

Defendant sent his return e-mail on April 15, at 12:25 p.m., stating simply: "We are in agreement on this e-mail." The e-mail then identified a required refinement to Plaintiff's proposed non-compete agreement, but nothing more.

The next correspondence contained in Exhibit A occurred on the morning of April 16, in which Defendant asked Plaintiff to have "your legal people draw upon the contract." Plaintiff responded by sending an e-mail to its counsel, asking that he "prepare a brief plain English agreement using the agreed upon terms below." In

what appears to be a copy of the e-mail sent to counsel, Plaintiff told Defendant that "we should have something to you next week."

DISCUSSION

The general rule, as stated in Restatement (Second) of Contracts § 27, and quoted in Plaintiff's Memorandum, is that

> Manifestations of assent that are in themselves sufficient to conclude a contract will not be prevented from so operating by the fact that the parties also manifest an intention to prepare and adopt a written memorial thereof; but the circumstances may show that the agreements are preliminary negotiations.

Id. However, the facts of this case, as shown by the pleadings and attachments, demonstrate that this matter is governed by a corollary to the rule as addressed in comment b:

> On the other hand, if either party knows or has reason to know that the other party regards the agreement as incomplete and intends that no obligation shall exist until other terms are assented to or until the whole has been reduced to another written form, the preliminary negotiations and agreements do not constitute a contract.

Id. at comment b. The courts of this jurisdiction have affirmed this fundamental tenet of contract law in stating:

> There does not appear to be any doubt that if the parties make it clear that they do not intend that there should be legal consequences unless and until a formal writing is executed, there is no contract until that time.

Engineering Assoc., Inc. v. Irving Place Assoc., Inc., 622 P.2d 784, 787 (Utah 1980). While the Plaintiff would construe the statement made by Defendant in the April 13 e-mail that no agreement between the parties would be considered binding until a physically executed contract between the parties is completed as meaning merely that there was an intention to memorialize the agreement reached through e-mail correspondence, the clear language of those e-mails belies that assertion. It is upon the written documents alleged to have formed agreement itself that the Court must base its decision, and not upon one party's interpretation of that document. There is no ambiguity in Defendant's reservation of the right to rescind or modify his offer until a formal contract was executed by counsel. Nor is there any ambiguity in the e-mails—the very documentation which Plaintiff now contends establishes the terms of the agreement—that Plaintiff did not consent to Defendant's conditional offer.

Plaintiff argues the court is not to weigh evidence and if there is any dispute in material fact, the jury must resolve whether the parties intended an agreement. While that is true, the court must also examine the facts set forth through the prism of the burden of proof borne by the parties. While the parties can

and do disagree on what the series of e-mails means, the court believes that as a matter of law those are clear.

Even if there was a contract and agreement on essential terms, until something was executed and signed, defendant could rescind it at his discretion.

Because there was no formally executed contract based on the facts the court determines are not in genuine dispute, the law requires Defendant's Motion for Summary Judgment be GRANTED.

This Ruling and Order is the Order of the court and no other order is required.

DATED this 13 day of December, 2004.

BRUCE C. LUBECK
District Court Judge

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 040911552 by the method and on the date specified.

METHOD	NAME
Mail	BLAKE D MILLER ATTORNEY PLA 170 S MAIN ST #350 SALT LAKE CITY, UT 84101
Mail	DENVER C SNUFFER ATTORNEY DEF 10885 SOUTH STATE STREET SANDY UT 84070

Dated this 13 day of Dec., 2004.

JR

Deputy Court Clerk